Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1650

SUPREME EQUIPMENT & SYSTEMS CORPORATION,

Petitioner,

v.

THE WALTER M. BALLARD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 18, 1980

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IN THE

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SUPREME EQUIPMENT & SYSTEMS CORPORATION,

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v.

THE WALTER M. BALLARD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

There is no opinion of the Court of Appeals for the District of Columbia Circuit accompanying its judgment. The Court's judgment affirming the judgment of the District Court appears in Appendix D. The District Court's memorandum opinion appears in Appendix C. The Court of Appeals' first opinion in this case is not reported. It appears in Appendix B. The District Court's first opinion in this case is not reported. It appears in Appendix A. The order of the Court of Appeals denying petitioner's petition for rehearing of the judgment of affir-

mance of the District Court's second decision and the order of the Court of Appeals denying petitioner's suggestion for rehearing *en banc* are not reported and appear in Appendices E and F respectively.

JURISDICTION

The judgment of the Court of Appeals was filed on December 11, 1979. The order of the Court of Appeals denying rehearing was filed on January 21, 1980. This Court has jurisdiction to review the Court of Appeals' judgment pursuant to 28 U.S.C. § 1254.

QUESTION PRESENTED

May a court of appeals issue a bare order of affirmance without any statement of reasons in a case in which another panel of the same court of appeals in the same case earlier reached a different conclusion on the same issue?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Federal Constitution provides, *inter alia:*

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law;
> . . . .

28 U.S.C. § 46(c) provides in pertinent part:

> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . .

STATEMENT OF THE CASE

This was a civil suit brought in the U.S. District Court for the District of Columbia under diversity jurisdiction pursuant to 28 U.S.C. § 1332. The Walter M. Ballard Company sued Supreme Equipment & Systems Corporation for a breach of an alleged contract to pay a contingent fee for arranging for the sale of special filing cabinets to the federal government. Supreme moved to dismiss the complaint on the ground that an agreement to pay a contingent fee to procure a contract with the federal government to furnish supplies is void as against public policy and unenforceable in the courts. *Providence Tool Company v. Norris,* 2 Wall. 45, 69 U.S. 45 (1864). Ballard submitted affidavits to show that it came within the exception for "bona fide commercial or selling agencies maintained by the contractor for the purpose of securing business." 41 C.F.R. § 1-1.504-3. The District Court entered summary judgment for Supreme, finding,

> As developed by counsel at oral hearing, the facts of this case do not support the kind of continuing relationship which would bring this case within the narrow exception. Ballard's contingent fee agreement was for a specific contract for the sale of a special "privacy file" to IRS. When the efforts to procure an IRS contract failed, Ballard ceased its efforts on behalf of Supreme. Ballard's other activities on behalf of Supreme were to attempt to sell its products as a middleman, buying Supreme's products and reselling them at a mark-up to government and private purchasers. Furthermore, no continuing relationship on a broad basis has been shown. Accordingly, the Court concludes that the arrangement which Ballard seeks enforced here falls

within the rule prohibiting commission agreements on sales to the federal government. App. 4a.

Ballard appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the District Court's judgment and remanded for trial by the jury of the issues relating to the availability of the exception. In a Memorandum Opinion explaining that summary judgment should not have been entered because there were substantial issues, the Court of Appeals said that the District Court "had to and did stray into the forbidden area of resolving disputed questions of fact. Accordingly, its action cannot be left undisturbed." App. 9a.

On remand, the case was tried to a jury. Over Supreme's objection, the District Court did not submit to the jury Supreme's defense that Ballard did not come within the exception to the rule prohibiting contingent fee arrangements to procure a contract to furnish supplies to the federal government. On the same evidence that led the District Court to find that Ballard was not within the exception, the District Court found that Ballard did have the kind of continuing relationship which came within the exception. App. 14a.

The jury found a verdict for Ballard in the amount of $60,162. Supreme appealed to the Court of Appeals for the District of Columbia. The case was briefed and argued orally to a panel of three judges all of whom were different judges from the panel which had remanded the case for trial of the issues relating to the availability of the exception. The second panel affirmed the District Court's disposition of the issues relating to the availability of the exception in a bare order of affirmance. App. 20a. There was no explanation at all of the second panel's reason for reaching an opposite conclusion to that of the first panel.

The second panel's order stated, "While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court." App. 19a.

Supreme petitioned for rehearing pointing out that under the circumstances of this case where the District Court had found opposite facts on the same evidence and the first panel of the Court of Appeals had held that the District Court should not be finding the facts at all, a bare order of affirmance without any explanation violated Supreme's constitutional and statutory rights to a reasoned decision. The second panel denied Supreme's petition for rehearing in a bare order without explanation. App. 21a. Supreme's suggestion for rehearing *en banc* was denied by a bare order without explanation. App. 23a.

REASONS FOR GRANTING THE WRIT

One word orders of affirmance or reversal without a statement of reasons may have justification in some caes but surely not in this case where one panel of the Court of Appeals held that the District Court should not itself have found the facts relating to Supreme's defense and then another panel of the same Court of Appeals affirmed without explanation when the District Court again did so. Supreme does not know why it lost this case. Supreme does not know whether the second panel concluded that there were not substantial issues of fact, contrary to the decision of the first panel. Supreme does not know whether the second panel decided that Supreme's defense was not valid, contrary to the first panel and the decision of this Court in *Providence Tool Co. v. Norris, supra.* Supreme does not know whether the second panel decided that disputed issues of fact can be decided by the District Court, contrary to the first panel and the decision of this Court in *United States v. Diebold, Inc.*, 369 U.S. 654

(1962). Nor does the bar or the public know what was the meaning and effect of the Court of Appeal's decision — but the bar and the public are not meant to know because the Court of Appeals' judgment is by order "Not to be Published" and by rule it is not to be cited. D.C. Cir. Local Rules 8(f) and 13(c). App. 19a.

Were Supreme's case the only instance of miscarriage of justice by disposition without a statement of reasons, this petition for certiorari would not be filed. As bitter as it is for Supreme to have the facts of its defense decided differently by the same judge on the same evidence, and as confusing and frustrating as it is for Supreme to have the Court of Appeals rule that its defense should not be decided by the jury and then for the same Court of Appeals, albeit a different panel, to affirm without explanation when the District Court itself again found the facts, Supreme knows that this honorable Court can only consider cases of special and general importance.

However, Supreme's case is not unique. What happened to Supreme in this case is happening in many other cases in many other courts of appeals throughout the country. The practice of deciding cases with one word orders of affirmance or reversal without any statement of reasons is, unfortunately, widespread. Supreme's case is a clear and egregious set of facts which provides the vehicle for this Court to appraise the practice among courts of appeals of deciding cases without any statement of reasons and tell the courts of appeals that care must be exercised to use the one-word disposition without explanation in only the few cases to which it properly applies.

The courts of appeals have powers and procedures to dispose of routine and simple cases without oral argument or briefs. Rule 2 of the Rules of Appellate Procedure permits courts of appeals to suspend the rules "in the interest of expediting decision." Local rules of the courts of ap-

peals provide for motions for summary affirmance or reversal. Therefore, if a case in a court of appeals reaches briefs and oral argument, presumably there are issues of substance which require full debate. In those cases which have been permitted to proceed to briefs and oral argument, one would anticipate that rarely would a court of appeals decide the case without giving reasons, even if the reasons are in a short memorandum which is unpublished. The time and effort devoted by the parties and the court would appear to require some statement of explanation of the decision.

Yet the fact is, and this is why certiorari should be granted, that Supreme's case is but one of thousands of cases which are disposed of every year by courts of appeals without a reasoned opinion after full briefs. Indeed, in the three statistical years of 1976, 1977 and 1978, the Annual Reports of the Director of the Administrative Office of the United States Courts reveal that out of a total of 29,601 cases heard orally or after submission on briefs there were 8,707 cases disposed of by courts of appeals without a signed or reasoned opinion. 1976 Report, p. 72a; 1977 Report, p. 179; 1978 Report, p. 169.[1] When 29.4% of all

[1] **Cases Disposed of Without Written Opinion after Oral Hearing or Submission on Briefs**

	1976	1977	1978
TOTAL	**2,749**	**3,871**	**2,087**
Circuit:			
District of Columbia	91	374	126
First	7	43	24
Second	6	167	63
Third	408	768	522
Fourth	14	32	16
Fifth	300	666	481
Sixth	421	305	598
Seventh	8	116	11
Eighth	7	65	30
Ninth	821	1,131	176
Tenth	18	204	40

cases disposed of after oral hearing or submission on briefs are unaccompanied by a reasoned decision, the problem is serious, substantial and of such national import as to justify consideration by this honorable Court.

The practice of disposing of cases without opinion grew out of the efforts of the Judicial Conference to meet the problems of burgeoning law libraries and overworked judges by recommending that courts of appeals limit the publication of their opinions.[2] This recommendation resulted in the adoption of local rules permitting disposition by summary order. The courts of appeals have used these local rules to dispose of a large number of cases without giving the parties, the court below, the bar or the public any hint as to the court's reasoning.

Analyses of summary dispositions by courts of appeals have revealed that, like Supreme's case, they hide inconsistent decisions. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A.J. 1224 (1975); Morrison, Decisions Without Reasons: A Crisis in the DC Circuit,* 1 District Lawyer No. 1, 36 (1976). The practice of issuing decisions without stating reasons has been uniformly condemned.[3] The criticisms are based on:

1) The destruction of the integrity of the judicial process. There is a danger that if reasons are not stated, the decision was reached without reasons or with inadequate reasons.

[2]Reynolds and Richman, *The Non-Precedential Precedent, Limited Publication and No-Citation Rules in the United States Courts of Appeals,* 78 Col.L.Rev. 1167, 1168-72 (1978).

[3]Reynolds and Richman, *The Non-Precedential Precedent,* 78 Col.L.Rev. 1167, 1173-76 (1978); Note, *Unreported Decisions in the United States Courts of Appeals,* 63 Cornell L. Rev. 128, 134-35 (1977); CARRINGTON, MEADOR, ROSENBERG, JUSTICE ON APPEAL, 10 (West Publishing, 1976); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals,* 1973 Wash.U.L.Q. 257, 272-73.

2) The need to assure litigants and the public that the determination emerged at the end of a reasoning process rather than an imperious ukase without a nod to law or a need to justify. Justice must not only be done but it must also appear to be done. One word disposition of cases invites the suspicion that the court has not adequately considered the case or has reached its judgment through impermissible means. A court asks too much when it asks that its decision be accepted as the correct result achieved after reasoned deliberation if no reasons at all appear.

3) This Court is left with an insufficient record on which to base a decision. *Taylor v. McKeithen,* 407 U.S. 191, 193-94 (1972).

These criticisms have led to the unanimous condemnation of the growing practice of one-word dispositions by commentators,[4] lawyers,[5] and judges.[6] The problem is constitutional. In Supreme's case, the affirmance without explanation deprived Supreme of due process of law guaranteed by the Fifth Amendment to the Federal Constitution. Supreme was also deprived of its statutory right to a decision. The requirement in 28 U.S.C. § 46(c) that cases "shall be heard and determined" means a reasoned determination which must be explained at least by memorandum however brief and even unpublished.

This Court has held that a decision of an administrative agency which is not explained is not a valid decision. *At-*

[4]See note 3, *supra.*

[5]*Hearings Before the Comm'n on Revision of the Federal Court Appellate System,* 451-52, 555 (2d Phase 1974-1975).

[6]*Id.* at 826, 1107; Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 49-53 (1975); Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility,* 23 U.C.L.A. L. Rev. 432, 436, 438, 440, 441 (1976).

chison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade, 412 U.S. 800, 807-09 (1973); *Secretary of Agriculture v. United States,* 347 U.S. 645, 652-54 (1954); *S.E.C. v. Chenery Corp.,* 318 U.S. 80, 94 (1943). The same principle of due process applies to a court decision in a case like Supreme's.

The requirement for a reasoned decision is especially applicable to Supreme's case because there were inconsistent decisions by different panels of the same Court of Appeals in the same case. The Court of Appeals was required to reconcile inconsistent decisions between panels of its own court. *Wisniewski v. United States,* 353 U.S. 901, 902 (1957).

As revealed in the growing body of legal literature on one-word dispositions by courts of appeals, there is increasing concern with abuses of the rules permitting unpublished opinions which were designed to economize judicial time by adumbrating opinion writing. The abuses recorded in the legal literature are focused in Supreme's case: It is impossible to reconcile the decision of the first panel that the District Court erred in itself finding the facts with the decision of the second panel affirming the District Court after it found the facts itself on the same evidence in completely contradictory ways. Only the second panel can explain how it reached its decision but the second panel did not do so. This Court is unable to exercise its power and responsibility of review. The decision of the Court of Appeals is a non-decision.

CONCLUSION

It is because there are so many non-decisions by the courts of appeals that the Court should grant this petition and issue a writ of certiorari to the Court of Appeals. The

mounting clamor against the abuses of the no-opinion rules of the courts of appeals deserves this Court's attention. The instant case focuses all of the abuses. It is the perfect vehicle for examination of the administration of the no-opinion rules of the courts of appeals and, if the rules have been abused as so many believe they have been abused, the reversal of the unexplained judgment in Supreme's case will advise the courts of appeals that constitutional limits can be transgressed and more selectivity should be exercised in the use of one-word decisions without explanation.

Respectfully submitted,

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April 18, 1980

APPENDICES

A – Opinion of the District Court Granting Summary Judgment for Defendant on the Issue of Defendant's Defense, March 9, 1976.

B – Judgment of Circuit Judges McGowan, Tamm and Robinson Remanding for Trial of Defendant's Defense, November 14, 1977.

C – Memorandum Opinion of the District Court Granting Summary Judgment for Plaintiff on the Issue of Defendant's Defense, August 18, 1978.

D – Judgment of Circuit Judges Wright, Robb and Corcoran Affirming Without Opinion the Summary Judgment for Plaintiff on Defendant's Defense, December 11, 1979.

E – CADC Order denying Petition for Rehearing, January 21, 1980

F – CADC Order denying Petition for Rehearing *en banc*, January 21, 1980

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WALTER M. BALLARD COMPANY	)	
	)	Civil Action
Plaintiff	)	No. 75-2019
	)	
vs	)	Filed
	)	Mar. 9, 1976
SUPREME EQUIPMENT & SYSTEMS CORPORATION	)	James F. Davey
	)	Clerk
	)	
Defendant	)	

OPINION

Plaintiff, the Walter M. Ballard Company (Ballard) filed a complaint for breach of contract and fraud arising out of an alleged agreement between Ballard and defendant, Supreme Equipment & Systems Corporation (Supreme), whereby Ballard was to be paid a commission of 10% of the value of sales of Supreme's products to agencies of the federal government of which Ballard was the procuring cause. Supreme filed a motion to dismiss the complaint on the ground that the alleged agreement is void and unenforceable.[1] Ballard filed a brief in opposition to the motion to dismiss and an affidavit of Walter M. Ballard, Ballard's president. The matter was heard at oral argument on March 4, 1976, and an Order was issued dismissing the complaint with prejudice. In accordance with that Order, the Court enters the following opinion.

---

[1]Supreme also moved to dismiss on the ground that Ballard had not qualified to do business in the District of Columbia. Subsequently, Ballard qualified in the District of Columbia and this issue was not pressed further. *Hill-Lanham, Inc.* v. *Lightview Development Corp.*, 163 F.Supp. 475, 483 (D.D.C. 1957); *Federal Looseleaf Corp.* v. *Woodhouse Stationery Co.*, 163 F.Supp. 482, 483 (D.D.C. 1958).

Findings of Fact

The following sets forth the relevant facts of the case as alleged by the plaintiff. On a motion to dismiss, the Court accepts the allegations of the complaint as true.[2]

Ballard, with its predecessors in interest, has been engaged in selling office products and systems for more than sixty years in the District of Columbia. Ballard has sold office equipment to government agencies, as well as to private commercial purchasers. Ballard has served as a consultant and supplier of office equipment for numerous manufacturers in the United States.

Supreme is a manufacturer and distributor of filing cabinets. In the late fall of 1973, Supreme approached Ballard to request Ballard to sell Supreme's equipment to private industry and to government agencies. It was contemplated that in the commercial field, Ballard would function as a jobber, purchasing Supreme's equipment at wholesale and reselling it at retail. However, as to contracts with the federal government, sales were to be made directly by the defendant with the plaintiff receiving commissions equal to ten percent of the value of the sales of which Ballard was the procuring cause. Pursuant to the agreement, Ballard diligently undertook to represent the defendant in the sale of its products to IRS and filed a GSA registration form to give notice that a commission was to be received from an IRS contract.

On or about April 25, 1975, Supreme informed Ballard that Supreme was unable to complete any sales of its product to the IRS as a result of the refusal of the General Services Administration (GSA) to allow IRS to complete this purchase. Relying on these representations, "Ballard

[2]The Court has similarly considered the affidavit of Walter M. Ballard.

discontinued its ongoing efforts, commenced in February 1974,to assist in the consummation of sales to IRS, as well as other government agencies in this product."

Without the aid or knowledge of Ballard, Supreme successfully negotiated with GSA an agreement whereby Supreme's specially designed "privacy file" was placed on GSA's New Item Introductory Schedule. From this list federal agencies could and did place orders directly with Supreme for these files.

Ballard requested Supreme to pay commission of 10% of the value of privacy files ordered by IRS field offices from Supreme pursuant to the GSA New Item Introductory Schedule. Supreme refused to pay the requested commissions and this suit was brought by Ballard for 10% of the gross amount of all sales of products by Supreme to the Internal Revenue Service pursuant to the GSA New Item Introductory Schedule, for 10% of the gross amount of all sales of products to all other agencies of the federal government pursuant to the GSA New Item Introductory Schedule, for commissions for future sales, and for punitive damages.

Conclusions of Law

It is fundamental that an agreement to pay a contingent fee to procure a contract with the federal government to furnish supplies is void as against public policy and unenforceable in the courts. *Providence Tool Company* v. *Noris,* 2 Wall 45, 69 U.S. 45 (1864); *LeJohn Manufacturing Company* v. *Webb,* 222 F.2d 48 (D.C.Cir. 1955); *Bradley* v. *American Radiator and Standard Sanitary Corporation,* 159 F.2d 39 (2nd Cir. 1947); *Silverman* v. *Osborn Register Co.,* 155 F.2d 879 (D.C.Cir. 1946), 41 C.F.R. § 1-1.5. Although unquestionably harsh at times, the rule has been uniformly applied to assure the preven-

tion of undue influence in obtaining government contracts and unnecessary expenditures of public funds.

An exception, however, embodied in the Federal Procurement Regulations and narrowly construed by the courts is available to a bona fide, established commercial or selling agent maintained by the contractor for the purpose of drumming up business generally. The exception is not applicable to an agent employed or maintained to procure a specific contract. It is within this provision that Ballard seeks to qualify.

As developed by counsel at oral hearing, the facts of this case do not support the kind of continuing relationship which would bring this case within the narrow exception. Ballard's contingent fee agreement was for a specific contract for the sale of a special "privacy file" to IRS. When the efforts to procure an IRS contract failed, Ballard ceased its efforts on behalf of Supreme. Ballard's other activities on behalf of Supreme were to attempt to sell its products as a middleman, buying Supreme's product and reselling them at a mark-up to government and private purchasers. Furthermore, no continuing relationship on a broad basis has been shown. Accordingly, the Court concludes that the arrangement which Ballard seeks enforced here falls within the rule prohibiting commission agreement on sales to the federal government. *LeJohn, supra; Bradley, supra.* See *Reynolds* v. *Goodwin-Hill Corporation,* 154 F.2d 553 (2nd Cir. 1946).

Lastly, Supreme has requested this Court to award attorney's fees under the narrow exception for vexations and unfounded litigation. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). Although the controlling principle in this case as established in *Providence Tool Company, supra,* is specific, the applicability of the exceptions thereto, which hinge on each new set of

facts, is not unnecessarily debatable. The Court, therefore, finds the awarding of counsel fees inappropriate in this action.

June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX B

No. 76-1904 September Term, 1977

Civil 75-2019

The Walter M. Ballard Company
a body corporate, Appellant

v.

Supreme Equipment & Systems
Corporation
a body corporate

United States Court
of Appeals
for the District of
Columbia Circuit

Filed Nov. 14, 1977
George A. Fisher
Clerk

Appeal from the United States District Court for the District of Columbia.

Before: McGOWAN, TAMM and ROBINSON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded for further proceedings, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor on motions to file bills of costs out of time.

MEMORANDUM

The issues raised by appellant's complaint filed in the District Court turn upon an application of the federal procurement regulations embodying the policy, originally formulated by the Supreme Court, *Providence Tool Co. v. Norris,* 69 U.S. 45 (1864), against contracts to procure government business for contingent fees. 41 C.F.R. § 1-1.500. The regulations except from such policy "bona fide commercial or selling agencies maintained by the contractor for the purposes of securing business" (504-3), and identify the specific factors to be taken into account in deciding whether the exception applies (504-5).

Appellee's response to the complaint was a Rule 12(b)(6) motion to dismiss for failure to state a claim. Appellant's opposition to the motion was accompanied by an affidavit by its president asserting certain facts. Thus the District Court, in ruling on the motion to dismiss, was in effect dealing with a motion for summary judgment.[1]

At oral argument held on the motion, appellee made clear that its motion rested upon the theory that, assuming the facts to be as stated in the complaint and affidavit, the claim was barred by reason of the public policy reflected in the procurement regulations. The District Court's opinion reveals clearly that it embraced that theory in its grant of the motion.

However, certain of appellant's allegations of fact do, at the least, raise substantial issues relating to the availability of the exception contained in the regulations. The District Court in its opinion granting the motion does not, however, accept these allegations as true; and indeed finds the facts to be otherwise. This is notably true of such matters as whether the relationship between appellant and appellee was broad and continuing, how to characterize the contractual arrangement between the parties, and whether this arrangement would have operated to increase the cost to the government of the materials supplied by appellee.

[1]Appellant moved for reconsideration, supplying two more affidavits by its personnel. That motion was denied, but appellee represents that, for present purposes, it does not dispute the facts alleged in those affidavits.

Because the District Court did not grant the motion by reference to the facts accepted by appellee, it had to and did stray into the forbidden area of resolving disputed questions of fact. Accordingly, its action cannot be left undisturbed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Aug. 18, 1978
James F. Davey, Clerk]

WALTER M. BALLARD CO.	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action
	)	No. 75-2019
SUPREME EQUIPMENT AND SYSTEMS CORPORATION	)	
	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This matter is before the Court on defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Rule 50(b) Fed.R.Civ.P.

Plaintiff, a dealer and distributor of office equipment and filing systems, filed this action for breach of contract and fraud arising out of an alleged agreement between plaintiff and defendant, a manufacturer of such equipment, whereby plaintiff was to be paid a commission of 10% of the value of sales of defendant's products (privacy files) to agencies of the federal government[1] for which plaintiff was the procuring cause. On March 4, 1976, following the submission of written briefs by the parties and oral arguments, this Court entered an order granting defendant's motion to dismiss for failure to state a claim on which relief could be granted and dismissing the complaint with prejudice. In accordance therewith, the Court

[1]Specifically, this case involves sales to the Internal Revenue Service (IRS). However, in attempting to consummate the sales at issue, it was necessary for the parties to negotiate with the General Services Administration (GSA) as well.

issued an opinion on March 9, 1976. On November 14, 1977, the United States Court of Appeals for the District of Columbia Circuit reversed this Court's judgment and remanded it for further proceedings "[b]ecause the District Court did not grant the motion by reference to the facts accepted by appellee, [and] it had to and did stray into the forbidden area of resolving disputed questions of fact." Memorandum, at 2.

Accordingly, this matter came on for a trial by jury on May 17, 18 and 19, 1978. Pursuant to the jury's verdict, judgment was entered for plaintiff on May 24, 1978 in the amount of $60,162.[2]

With regard to the instant motion, the standard for granting a motion for jugment n.o.v. is the same as that for a directed verdict: "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party. In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses. Instead it must view the evidence most favorably to the party against whom the motion is made [here, plaintiff] and give that party the benefit of all reasonable inferences from the evidence." 9 Wright & Miller, Federal Practice and Procedure: Civil § 2524, at 543-545 (1971).

Defendant has moved in the alternative for a new trial. The grounds for this aspect of defendant's motion are the same as those applicable to a motion under Rule 59, Fed.R.Civ.P. Rule 59 invokes the discretion of the trial court to grant a new trial if, *inter alia,* the verdict is against

[2]This amount represented 10% of the gross sales of defendants' privacy file to the IRS in 1975.

the weight of the evidence or a question of law arises out of substantial error in the refusal to give an instruction. *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243 (1940); 11 Wright & Miller, Federal Practice & Procedure: Civil § 2805, at 37-38 (1971). In deciding if the verdict is contrary to the weight of the evidence, this Court will not set aside a jury verdict unless it is clearly erroneous. *McCarthy v. Cahill,* 249 F.Supp. 194, 197 (D.D.C. 1966). Otherwise, it is loath to interfere with the jury's role as the trier of fact.

For the reasons set forth below, the Court denies both aspects of defendant's motion.

First, the Court finds that there was sufficient evidence adduced at trial to support a verdict for plaintiff so that such a result was not clearly erroneous. Giving plaintiff the benefit of all reasonable inferences, it was possible for the jury to conclude that: (1) there was an agency (dealer) relationship between plaintiff and defendant that plaintiff was to act for the benefit of defendant in accordance with defendant's instructions; (2) such a relationship was established pursuant to an oral contract between authorized reprsentatives of the parties;[3] (3) plaintiff did not at any time abandon its efforts to complete the transaction until it was told by defendant that "the deal was off"; (4) since this instruction was communicated to plaintiff at the same time that defendant was negotiating with the Charles G. Stott Company in an attempt to complete the sale, such misrepresentations negated any allegations that plaintiff abandon the negotiations; and (5) despite the fact that the transaction was finally consummated by a second dealer, Charles G. Stott Company, plaintiff could be considered

[3]Morton Basist, authorized representative of defendant, and the late Walter M. Ballard, plaintiff's president, had orally agreed that plaintiff would receive a commission equal to 10% of the gross amount of all sales to the federal government which plaintiff was able to generate.

the "procuring cause" of the sale of defendant's products because it found a purchaser who was ready, willing and able to buy the product. Thus, the success of the sale was directly attributable to its efforts.

The Court further finds that there was no factual dispute as to whether plaintiff met the requirements of 41 C.F.R. § 1-1.5, *et seq.*[4] and accordingly, the Court did not err in refusing to submit the matter to the jury.[5]

That plaintiff was a " 'bona fide established commercial selling agency, maintained by the contractor for the purpose of securing business' ", 41 C.F.R. § 1-1.504-5, was made clear by testimony which supported the relevant factors to be considered. First, the compensation arrangement agreed upon by the parties was typical of such arrangements and thus could not be characterized as "inequitable and exorbitant in relation to the services actually rendered." 41 C.F.R. § 1.504-5(b)(1). Second, it was clear that plaintiff had "adequate knowledge of the products and the business of the concern represented, as well as other qualifications necessary to sell the products or services on their merits." 41 C.F.R. § 1-1.504 (b)(2). This was due to its experience and expertise in the sale of office equipment generally and in the sale of such products to the federal government in particular. It was undisputed that

[4]This subpart prescribes the use by executive agencies of the "covenant against contingent fee" which is applicable to all contracts for the procurement of personal property. Pursuant to this covenant, which is included in every negotiated or advertised contract, "[t]he Contractor warrants that no person or selling agency has been employed or retained to solicit or to secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee except . . . bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business." 41 C.F.R. § 1-1.503.

[5]Defendant submitted a proposed jury instruction which the Court declined to give.

plaintiff is an established business concern which has regularly conducted this sort of business for a number of years. 41 C.F.R. § 1-1.504-5(b)(4). Finally, the parties intended their relationship to be a continuing one. It was not established solely in contemplation of the privacy file sales that are the subject of this suit. 41 C.F.R. § 1-1.504-5(b) Rather, plaintiff was to act as defendant's agent in the promotion and sale of its entire span of products both to commercial concerns and to the government. This relationship has continued until as recently as last year. See defendant's exhibit #5. 41 C.F.R. § 1.1-504-5(b)(5).[6] In addition, the GSA representative testified unequivocally that the relationship between the parties herein with regard to the challenged sales was neither unusual nor improper. In fact, it was a similar relationship which defendant had with Stott to whom it did pay a commission.

In short, the relationship between plaintiff and defendant was such that the objectives of 41 C.F.R. § 1.5 – "the prevention of improper influence in connection with the obtaining of government contracts, the elimination of arrangements which encourage the payment of inequitable and exorbitant fees bearing no reasonable relationship to the services actually performed, and the prevention of unwarranted expenditures of public funds" – have been met. Thus, the Court concluded that there was nothing

[6]It is admitted that the parties had established a different method of compensation for commercial sales (50% of the list price). The Court determined that this was irrelevant to its analysis of this factor. Additionally, 41 C.F.R. § 1-1.505-4(b)(5) states in pertinent part: "The fact that a selling agency confines its selling activities to the field of government contracts does not, in and of itself, disqualify it under the covenant. The fact, however, that the selling agency is employed to secure business generally, that is, to represent the concern in connection with sales to the government as well as regular commercial sales to non-government activities is a factor entitled to favorable consideration. . . ."

presented in this regard that would permit reasonable minds to differ and accordingly, it was not a proper question to be put to the jury.

For the foregoing reasons, defendant's motion for a judgment notwithstanding the verdict and its alternative motion for a new trial are both denied. An appropriate order is entered herewith.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

DATED: August 17, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Aug. 18, 1978
James F. Davey, Clerk]

THE WALTER M. BALLARD COMPANY Plaintiff	:	
v.	:	Civil Action No. 75-2019
SUPREME EQUIPMENT AND SYSTEMS CORPORATION Defendant	:	

ORDER

Upon consideration of defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, plaintiff's opposition thereto, and the entire record herein, the Court having concluded that there was sufficient evidence adduced at trial to support a verdict for plaintiff and that it was not substantial error to refuse to give the jury an instruction regarding the requirements of 41 C.F.R. § 1-1.5 *et seq.*, it is by the Court this 17th day of August 1978,

ORDERED that defendant's motion for judgment notwithstanding the verdict is hereby denied; and it is further

ORDERED that defendant's motion for a new trial is hereby denied.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX D

NOT TO BE PUBLISHED – SEE LOCAL RULE 8 (f)
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2264 September Term, 1979

[Filed Dec. 11, 1979
George A. Fisher
Clerk]

The Walter M. Ballard Company, a body corporate Civil Action No. 75-2019

v.

Supreme Equipment & Systems Corporation, a body corporate,
Appellant

Appeal from the United States District Court for the District of Columbia

Before: WRIGHT, Chief Judge, ROBB, Circuit Judge and CORCORAN*, Senior United States District Judge for the District of Columbia

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(c).

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2264 September Term, 1979

[Filed Jan 21, 1980
George A. Fisher
Clerk]

The Walter M. Ballard Company
a body corporate

v.

Supreme Equipment & Systems Corporation
a body corporate,
Appellant

Civil Action No. 75-2019

BEFORE: Wright, Chief Judge; Robb, Circuit Judge; and Corcoran*, Senior Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of appellant's (Supreme Equipment & Systems Corp.) petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 US.C. §292(a).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

[Filed Jan 21, 1980
George A. Fisher, Clerk]

No. 78-2264 September Term, 1979

The Walter M. Ballard Company
a body corporate

v.

Supreme Equipment & Systems Corporation
a body corporate,
Appellant

Civil Action No. 75-2019

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellant (Supreme Equipment & Systems Corp.) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc,* that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Supreme Court, U. S.
FILED
MAY 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1650

SUPREME EQUIPMENT & SYSTEMS CORPORATION,

Petitioner,

v.

THE WALTER M. BALLARD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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THE WALTER M. BALLARD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

May a court of appeals issue a bare order of affirmance without an opinion when the error alleged below is the failure of the trial court to instruct the jury on an issue on which there was no evidentiary dispute in the record?

COUNTERSTATEMENT OF THE CASE

This was a civil suit brought in the United States District Court for the District of Columbia under diversity jurisdiction pursuant to 28 U.S.C. § 1332. The

Walter M. Ballard Company sued Supreme Equipment & Systems Corporation for breach of an alleged contract to pay a contingent fee for arranging for the sale of special filing cabinets to the federal government. Supreme moved to dismiss the complaint on the ground that an agreement to pay a contingent fee to procure a contract with the federal government to furnish supplies is void as against public policy and unenforceable in the courts. Ballard submitted affidavits to show that it came within the exception for "bona fide commercial or selling agencies maintained by the contractor for the purpose of securing business." 41 C.F.R. § 1-1.504-3. The District Court entered summary judgment for Supreme, finding,

> As developed by counsel at oral hearing, the facts of this case do not support the kind of continuing relationship which would bring this case within the narrow exception. Ballard's contingent fee agreement was for a specific contract for the sale of a special "privacy file" to IRS. When the efforts to procure an IRS contract failed, Ballard ceased its efforts on behalf of Supreme. Ballard's other activities on behalf of Supreme were to attempt to sell its products as a middleman, buying Supreme's products and reselling them at a mark-up to government and private purchasers. Furthermore, no continuing relationship on a broad basis has been shown. Accordingly, the Court concludes that the arrangement which Ballard seeks enforced here falls within the rule prohibiting commission agreements on sales to the federal government. [A. 4a.]

Ballard appealed to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the District Court's judgment and remanded for trial by jury on the issue relating to the availibility

of the exception. In a Memorandum Opinion explaining that summary judgment should not have been entered because there were substantial issues, the Court of Appeals said that the District Court "had to and did stray into the forbidden area of resolving disputed questions of fact. Accordingly, its action cannot be left undisturbed." (A. 9a).

On remand, the case was tried to a jury. At trial, Supreme failed to produce any evidence from which a jury could reasonably conclude that Ballard did not come within the "bona fide" exception as defined in 41 C.F.R. § 1-1.504-3. Accordingly, there was no basis for the jury to conclude that Ballard was not entitled to enforcement of the contract in question, and the District Court refused to submit Supreme's instruction on this issue to it.

The jury found for Ballard and awarded it a judgment in the amount of $60,162.00. Supreme moved for a new trial on the basis of the District Court's refusal to instruct the jury on the enforceability issue. The District Court denied the motion, citing its reasons fo doing so in a Memorandum Opinion (A. 11a). Supreme appealed to the Court of Appeals for the District of Columbia Circuit. Supreme raised as one of the issues on appeal the District Court's refusal to instruct the jury on the enforceability of the contract. However, Supreme was unable in either its brief on appeal or at oral argument to point to any evidence adduced at trial which would have supported such an instruction. The Court of Appeals accordingly affirmed the District Court's disposition of this issue, without opinion. Supreme's subsequent petitions for rehearing and for hearing *en banc* were denied, no judge having considered Supreme's *en banc* petition voting to grant it.

REASONS FOR DENYING THE WRIT

As Supreme correctly notes in its Petition, the Judicial Conference many years ago recognized the need for flexibility in the disposition of cases at the appellate level. Following the recommendations of the Conference, the various circuits, including the District of Columbia Circuit, adopted rules specifically designed to allow for the disposition of cases without opinion where the issues occasion no need therefor. *See* Rule 13(c), General Rules of the United States Court of Appeals for the District of Columbia Circuit, revised and reprinted August, 1975.

Supreme alleges in its Petition that the judgment of the Court of Appeals in No. 78-2264 (A. 19a) was inconsistent with the previous ruling of the Court of Appeals in No. 76-1904 (A. 1a). However, as Ballard pointed out in its brief in No. 78-2264 (*see* Respondent's Appendix, 19) and further asserted in oral argument, there was no conflict between the two opinions.

The Court of Appeals' opinion in No. 76-1904 merely held that Ballard (as well as Supreme) had to be given the opportunity to present evidence demonstrating that it fell within the exceptions to the regulations on contingent fee contracts. Ballard presented such evidence, as was amply demonstrated in the record before the Court of Appeals, and is set forth in the Appendix. Supreme failed to produce any evidence that tended to dispute Ballard's proof. Thus, when the case reached the Court of Appeals in No. 78-2264, it was in an entirely different posture from that which confronted the Court in its earlier decision. In No. 78-2264, the Court of Appeals merely upheld the well-established doctrine that a party is not entitled to the jury's consideration of an issue on which it fails to produce any evidence.

In *Taylor v. McKeithen*, 407 U.S. 191 (1972), this Court set aside the ruling of the Fifth Circuit Court of Appeals and remanded for further proceedings. The Fifth Circuit had reversed without opinion the order of the district court establishing a reapportionment plan in a suit brought under the Voting Rights Act. The district court had adopted its plan after extensive hearings conducted by a special master, and a lengthy trial. The court of appeals summarily rejected the master's plan in favor of a plan proposed by the Louisiana Attorney General. This Court, noting the extensive record supporting the district court's ruling, and the lack of any guidance by the court of appeals in summarily reversing that ruling, remanded for further consideration by the court of appeals, noting that the court of appeals may have ruled as it did on the (improper) assumption that the order of the district court constituted gerrymandering.

This Court went on to note that:

> "We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances. . . . But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District judge. . . ."

407 U.S. at 194, n.4.

Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Powell joined in a dissenting opinion, stated the following:

> "I think decisions as to whether opinions should accompany judgments of the courts of appeals, and the desirable length and content of those

> opinions are matters best left to the judges of the courts of appeals."

407 U.S. at 196.

CONCLUSION

Unlike *Taylor, supra,* this case involves a summary affirmance of the ruling of the District Court. That ruling merely upheld a well-established, basic legal principle as stated above. Moreover, the District Court set forth with ample clarity its rationale for refusing to instruct the jury as requested by Petitioner (A. 11a). There is accordingly no basis upon which this Court should exercise its jurisdiction over this matter.

Respectfully submitted,

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May 19, 1980